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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

EUGENE A. FISCHER,

Petitioner,

v.

STAN YATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit's tri-partite test for reviewing federal habeas cases arising out of the savings clause of Title 28, United States Code, Section 2255 constitutes a suspension of the writ of habeas corpus where that test bars both recognition of an acknowledged constitutional violation of *Richardson v. United States*, 526 U.S. 813 (1999) and evidence of actual innocence?

2. Whether the Eleventh Circuit's tri-partite test for reviewing federal habeas cases which bars recognition of acknowledged constitutional violations of *Richardson v. United States*, 526 U.S. 813 (1999) and evidence of actual innocence, and does not consider historical considerations of habeas courts as courts of equity renders Section 2255 "inadequate and ineffective" warranting habeas relief under Title 28, United States Code, Section 2241?

3. Whether evidence of actual innocence, both as a gateway claim and substantively, must be considered as part and parcel of a federal prisoner's habeas petition under Title 28, United States Code, Section 2241?

LIST OF PARTIES

Petitioner, Eugene A. Fischer, was the petitioner in the District Court and the appellant in the Court of Appeals. Respondent, Stan Yates, was the Respondent in the District Court and the appellee in the Court of Appeals. Respondent, Donald A. McKelvey, was the original Respondent in the District Court until being replaced as Warden by Respondent Stan Yates.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Eugene A. Fischer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit which was entered in the above-entitled case on October 1, 2007.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, entitled *Eugene A. Fischer v. Stan Yates*, is unreported and is included in the appendix attached hereto at page App. 1. The opinion of the United States District Court for the Middle District of Florida, is unreported and is included in the appendix attached hereto at page App. 6.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1). On October 1, 2007, the United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the district court in the case of *Eugene A. Fischer v. Stan Yates*, unpublished order (11th Cir. October 1, 2007). No petition for rehearing was filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, clause 2 of the United States Constitution provides in pertinent part:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The fifth amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . denied of life, liberty or property without due process of law.

Title 28, United States Code, Sections 2241(c)(3) (habeas corpus), provides in pertinent part:

> The writ of habeas corpus shall not extend to a prisoner unless – . . .
>
> 3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . [set out fully in the appendix to this brief at App. 15]

Title 28, United States Code, Section 2255 (savings clause) provides in pertinent part:

> . . . An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief,

unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. . . . [set out fully in the appendix to this brief at App. 18]

STATEMENT OF THE CASE

1. Petitioner, Eugene A. Fischer, is an innocent man. Notwithstanding his innocence, he unconstitutionally has been incarcerated in federal prison since 1987, based on a conviction under 21 U.S.C. Section 848(b), for being a principal administrator of a Continuing Criminal Enterprise ("CCE") involving the distribution and importation of marijuana. Petitioner entered a not guilty plea to his federal charges, and the case proceeded to trial.

At trial, Petitioner vigorously challenged the evidence offered by the prosecution.[1] The evidence at trial focused on a series of large marijuana shipments that came in from Colombia during the 1980's. Petitioner was a partner with George Brock ("Tom") in a shipping business which was utilized to transport the marijuana to places in the United States, including, Florida, New Orleans, New York, and San Francisco.

[1] Following a 15-week trial, Petitioner was convicted of both counts of the indictment in which he was named. The court sentenced Petitioner to a term of mandatory life imprisonment on Count One (the CCE Count) and 35 years concurrently on Count Two (the narcotics conspiracy count). The conspiracy count was subsequently set aside.

Only a handful of witnesses provided any testimony against Petitioner and each claimed that his sole participation in the CCE was his presence at the unloading site of two shipments of marijuana. No evidence of any actual drug seizures, law enforcement surveillance, or other independent corroborating evidence against Petitioner was ever introduced at trial.

Part of the government's evidence was its attempt to link Petitioner to the Bicycle Club and the BTR trust, entities linked to Petitioner's codefendants, Randy Lanier and Ben Kramer. As part of his habeas petition, Petitioner offered newly-obtained evidence which demonstrated that he was not part of the Bicycle Club nor the entity that owned it, the BTR trust. This evidence consisted of pages of sworn testimony from subsequent court proceedings and a concession by the government that Petitioner was not part of the entities that laundered the CCE's finances, including the BTR Trust and the Bicycle Club. Petitioner argued that this newly-discovered evidence not only undermined confidence in the outcome of his trial by demonstrating the harm caused by the failure of the jury to properly consider the evidence in that case in accordance with the requirements of the constitution as set forth in *Richardson v. United States*, 526 U.S. 813 (1999), but it also demonstrated that the Petitioner is both actually and factually innocent of the CCE.

The district court refused to consider any evidence of actual innocence in ruling on Petitioner's

habeas claims. App. 6. The court ruled that under Eleventh Circuit precedent, it was not permitted to consider such evidence until and unless Petitioner could satisfy a tri-partite test set for Section 2241 petitions arising out of federal convictions. App. 13-14. The Eleventh Circuit affirmed the district court's decision and reaffirmed its tri-partite test and specifically the bar to consideration of any evidence of actual innocence until its court-created test could be met. App. 1.

2. Petitioner's CCE conviction was obtained as a result of a violation of his sixth amendment right to have the jury determine each of the essential elements of the CCE offense. At his trial, Petitioner insisted that the jury be instructed that it must find unanimously that each of the alleged predicate acts he supposedly was involved in be determined by the jury and submitted a jury instruction seeking that unanimity. The trial court refused to so instruct the jury. Petitioner appealed to the Seventh Circuit. The Seventh Circuit affirmed his conviction and life sentence, and this Court denied his petition for certiorari, declining to hear the legal issue it would later hear and decide in Petitioner's favor in *Richardson v. United States*, 526 U.S. 813 (1999). *United States v. Kramer*, 955 F.2d 479 (7th Cir. 1992), *cert. denied*, 506 U.S. 998 (1992).

The government subsequently agreed that Petitioner's CCE conviction was achieved without obtaining unanimous agreement about which predicate acts Petitioner was alleged to have committed

or participated in. At trial, the government made no effort to describe for the jury which of the predicate acts the government believed Petitioner was involved in and how each of them related to the indictment or the requirements of the CCE. The entirety of the government's evidence was simply to show that the various defendants and others participated in shipments of marijuana which came in from Colombia to the United States. No special interrogatories or verdicts were provided to the jury; Petitioner was not convicted of any substantive narcotics offenses. Thus, having presented the case to the jury at a level of generality without focusing the jury's attention on the specific involvement of Petitioner or any specific predicate acts, the risk that the jury would not consider predicate acts individually, or for that matter the Petitioner's separate participation in those acts, was unacceptably present. *See Richardson*, 526 U.S. at 818 ("by permitting a jury to avoid discussion of the specific factual details of each violation, [a general verdict] will cover-up wide disagreement among the jurors about just what the defendant did, or did not, do.").

3. Petitioner's efforts to utilize the extant post-conviction processes and Section 2255 proved to be inadequate and ineffective in his case because neither the district court nor the court of appeals ever addressed his post-conviction *Richardson* claim on the merits. Following his conviction, Petitioner filed a Rule 35 motion raising both his *Richardson* claim (although not so-styled because *Richardson* had yet to

be decided) and a claim that he could not be convicted both of a CCE and a narcotics conspiracy conviction. The Petitioner won the battle but lost the war: the district court agreed with his legal argument in part, but vacated the Petitioner's narcotics conspiracy conviction and not the CCE conviction, pursuant to *Rutledge v. United States*, 517 U.S. 292 (1996), and entered an amended judgment reinstating the life sentence on the CCE conviction. The defendant appealed and the Seventh Circuit affirmed the district court's Rule 35 determination. *United States v. Fischer*, 205 F.3d 967 (7th Cir. 2000).

While the Rule 35 appeal was pending, this Court decided *Richardson v. United States*, 526 U.S. 813 (1999). At that time, Petitioner had pending before the Seventh Circuit a request for a certificate of appealability on the denial of his Section 2255 petition (which he had prosecuted *pro se*) and a pending appeal of the denial of his Rule 35 motion. Petitioner immediately sought to present his *Richardson* issue in his pending Rule 35 appeal. The Seventh Circuit granted Petitioner's request and gave him leave to file supplemental briefs addressing the *Richardson* issue.

In deciding the Rule 35 appeal, however, a Panel of the Seventh Circuit ("the Rule 35 Panel") declined to reach the juror-unanimity-*Richardson* issue. In so declining, the Rule 35 Panel told Petitioner 1) the appropriate place for him to raise and for the court to address his *Richardson* issue was in a Section 2255 petition; and 2) the time and place for that resolution

was in his then *pending* Section 2255 appeal. Significantly, the Rule 35 Panel directly referenced the pending appeal in that Court by name and docket number (No. 98-1803). *United States v. Fischer*, 205 F.3d 967, 972 (7th Cir. 2000) ("Fischer filed a § 2255 motion in 1997, and *that* motion is currently on appeal before this Court. *See Fischer v. United States*, No. 98-1803; *United States v. Fischer*, No. 98-1860. Consideration of this *Richardson* issue is more appropriate in *that* docket.") (emphasis added).

Petitioner followed the Seventh Circuit's direction; he immediately sought to amend his Section 2255 petition and sought a certificate of appealability in the pending docket Case No. 98-1803 to raise his *Richardson* claim. As a precaution against being time-barred, Petitioner also filed another motion before the Seventh Circuit seeking leave to file a second or successive Section 2255 petition or, in the alternative, a habeas corpus petition under Section 2241, both as alternate routes to being permitted to raise his *Richardson* issue on the merits in the event the Court did not grant his certificate of appealability. The only legal argument and presentation made in his successive petition was the jury unanimity issue and the *Richardson* case.

A second Panel of the Seventh Circuit ("the Certificate of Appealability Panel") ruled simultaneously on both of these requests. The Certificate of Appealability Panel expressly gave Petitioner leave to amend his Section 2255 petition to include the *Richardson* issue and granted him permission to

raise the *Richardson* issue in this Section 2255 petition appeal. The Certificate of Appealability Panel denied the request for permission to raise his *Richardson* issue in a second or successive petition or in a habeas petition ruling that the *Richardson* issue was already squarely raised in the Section 2255 petition and would be resolved in that case so there was no need to allow a successive Section 2255 petition.

Following briefing and argument on the merits of the *Richardson* claim, the Seventh Circuit then issued its decision denying the Section 2255 appeal. The denial was not on the merits of the petition, but on the grounds that the *Richardson* claim was allegedly procedurally defaulted because it had not been raised in the original Section 2255 petition, which was filed prior to the *Richardson* decision and prior to the amendment allowed by the court of appeals. *Fischer v. United States*, 285 F.3d 596, 598 (7th Cir. 2002). The court of appeals subsequently denied a petition for rehearing. This Court denied Petitioner's request for issuance of a writ of certiorari of this ruling.

4. Petitioner's effort to have his *Richardson* and actual innocence claims heard under Section 2241, which was designed to act as a vehicle to provide an opportunity to redress fundamental defects and constitutional errors and to address claims of actual innocence, was defeated by application of the Eleventh Circuit's inflexible tri-partite rule for Section 2241 claims. Following denial of certiorari, Petitioner

filed a petition under Section 2241 raising his *Richardson* claim and his newly-discovered evidence/ actual innocence claim. Because of the Eleventh Circuit's tri-partite rule and its conclusion that *Richardson* errors are not cognizable under Section 2241, the district court denied Petitioner's claim. App. 6. The district court also refused to consider Petitioner's actual innocence evidence nor his arguments grounded in equitable considerations finding that neither was permissible until and unless the tri-partite test was satisfied. App. 13. The Eleventh Circuit affirmed the district court's conclusions. App. 1.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Decision Refusing to Consider Petitioner's Section 2241 Petition on the Merits Constituted an Improper Suspension of the Writ of Habeas Corpus Because its Court-Created Tri-Partite Test Barred Any Constitutional Claims Based on *Richardson v. United States*, 526 U.S. 813 (1999) and Did Not Consider Evidence of Actual Innocence.

This Court should grant a writ of certiorari to review the questions presented for several reasons. First, the issue surrounding the application and effect of the saving clause of Section 2241 for federal habeas petitioners is an important federal question in need of clear guidance to lower courts. Second, the legal standard surrounding the "inadequate and ineffective"

language of the savings clause is in considerable doubt and has generated conflicting decisions among the courts of appeals as to what sorts of claims are permissible under Section 2241. Third, the Eleventh Circuit's determination in this case was directly contrary to this Court's habeas jurisprudence set forth in its prior cases. Review in this Court is thus necessary to resolve a conflict between courts of appeals on these important issues, and the lower court ruling resolved a decision on "an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(a) and (c).

A. The Lower Federal Courts are in Disarray and in Need of Guidance on the Contours of the Savings Clause Provisions of Section 2255.

The Constitution of the United States forbids the suspension of the writ of habeas corpus, except in a situation of rebellion or invasion. U.S. Constitution, Article I, Section 9, cl. 2. In 1948, Congress enacted the predecessor to today's Section 2255 petition, which permits federal prisoners to bring post-conviction challenges in the court where they were originally convicted and not in the district where they were incarcerated. It is clear that in enacting Section 2255, Congress did not intend to limit in any way the substantive bases for challenging a person's custody, nor to prevent a prisoner from advancing ultimately a traditional habeas corpus petition should the procedural mechanisms of Section 2255 prove "inadequate or

ineffective." *United States v. Hayman*, 342 U.S. 205, 219 (1952) ("This review of the history of Section 2255 shows that it was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions."); *see also Davis v. United States*, 417 U.S. 333, 334 (1974) ("Section 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus."). For that reason, Congress enacted the savings clause of Section 2255 to permit federal inmates to proceed to a federal habeas petition under Section 2241, as an escape hatch, after having proceeded and having failed to obtain relief under Section 2255, to ensure that Section 2255 would not defeat their full rights under the writ of habeas corpus. *Hayman*, 342 U.S. at 223 ("In a case where the Section 2255 petition is shown to be 'inadequate or ineffective,' the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing.").

Thus, the savings clause as enacted provides as follows:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief *unless it also appears that the remedy by*

> *motion is inadequate or ineffective to test the legitimacy of his detention.*

28 U.S.C. Section 2255(3) (emphasis added). The only other occasion that this Court had to address the meaning of the "inadequate or ineffective" language of Section 2255 was in *Swain v. Pressley*, 430 U.S. 372 (1977). In *Swain*, this Court addressed whether a parallel provision in the District of Columbia criminal code, which had adopted the language of the Section 2255 savings clause, constituted a suspension of the writ of habeas corpus in violation of the U.S. Constitution. This Court held that it did not because the D.C. statute, exactly like Section 2255, had provided the availability of a direct habeas action in the event that the procedural mechanism proved "inadequate or ineffective," to test the legitimacy of his detention. *Id.* at 381. Relying on *Hayman*, this Court held, "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Id.* The only discernible difference between the District's procedure and federal habeas procedure was that the habeas proceedings were heard by federal judges with life tenure and the D.C. judges did not have life tenure. This Court found that difference not constitutionally significant reasoning that D.C. judges were as competent to rule on constitutional issues raised in habeas proceedings as were federal judges with life tenure. *Id.* at 383-84. In the end, the Court left open for the future the questions of what measures might demonstrate that the alternative collateral proceeding was not adequate or

effective to permit a direct habeas petition and whether the barring of such claims constituted an unconstitutional suspension of the writ of habeas corpus.

In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) which made major modifications to procedural requirements of post-conviction petitions including barring second or subsequent petitions under Section 2255 unless such petitions could meet stringent requirements and imposing a one-year statute of limitations period. This Court has granted review over issues arising out of numerous provisions of the AEDPA on a frequent and regular basis. *E.g.*, *Dodd v. United States*, 545 U.S. 353, 360 (2005) (one-year statute of limitations provision interpreted); *Lindh v. Murphy*, 521 U.S. 320 (1996) (retroactive effect of AEDPA); *Felker v. Turpin*, 518 U.S. 651 (1996) (second or successive petition provision). In reviewing these and other AEDPA issues, this Court has noted the importance of the federal issues at stake and the conflicts in the lower courts in formulating answers to the specific questions. *E.g.*, *Dodd*, 545 U.S. at 356 ("We granted certiorari to resolve a conflict in the Court of Appeals [over the issue decided]"); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) (noting "important question of federal law" regarding AEDPA on whether petitioner's amended petition was a second or subsequent petition).

The AEDPA did not modify or alter that savings clause provision in Section 2255. Thus, the lower

courts and the courts of appeals have had to decide what sorts of issues or procedural bars would render a Section 2255 proceeding "inadequate or ineffective" and which substitute collateral proceeding would permit a prisoner to bring his claim under Section 2241. Several different tests have emerged from the appellate courts.

The Third Circuit adopted the first test in *In re Dorsainvil*, 119 F.3d 245 (3d Cir. 1997). The court confronted a federal prisoner who had been convicted of using a firearm in relation to a crime of violence under 18 U.S.C. Section 924(c). This Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995) subsequently determined that the definition of "use" utilized by the lower courts was no longer valid. The Court altered the substantive reach of the 924(c) statute potentially rendering petitioner's conviction invalid. Because the *Bailey* decision rested on a statutory interpretation and not a constitutional issue, petitioner was unable to utilize Section 2255's avenue for second or subsequent petitions which required a constitutional issue which also had been held retroactive before permission could be granted to proceed under Section 2255. *Id.* The Third Circuit held, however, that because petitioner may have stood convicted for an offense which he no longer may have committed, and because there had been an intervening change in the law, he had not had an earlier opportunity to challenge his conviction, and therefore, Section 2255's safety valve provision permitted the claim to be heard under direct habeas.

Because petitioner "never had an opportunity to challenge his conviction as inconsistent with the Supreme Court's interpretation of Section 924(c)(1)," and because he may be "imprisoned for a crime that an intervening decision negates," Section 2255 was inadequate and ineffective to provide him with collateral relief. *Id.* Thus, he was permitted to bring his challenge under Section 2241. *Id.*

The Second Circuit in *Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997), announcing a different test, provided perhaps the broadest class of cases which could be brought under the savings clause. The Second Circuit surveyed this Court's prior cases on the savings clause and noted that the Congress' continued enactment of the savings clause even in the wake of the AEDPA strongly indicated that the savings clause governed more than merely procedural impediments and was intended to apply to those cases in which "serious constitutional questions as to Section 2255's constitutional validity are presented." *Id.* at 377-78. In *Triestman*, the Second Circuit was confronted with the same situation as the Third Circuit in *Dorsainvil*: the petitioner had been convicted of using a firearm in a crime of violence (pursuant to a guilty plea) but with an understanding of the law that had changed in light of this Court's decision in *Bailey*. *Id.* Among the issues which would trigger serious constitutional issues were cases, like the petitioner before it, in which the writ of habeas corpus would be suspended by making relief unavailable and where the petitioner continued to be incarcerated

although potentially actually innocent, and in situations where petitioner "had no effective opportunity to raise his claim of actual innocence." *Id.* Thus, the petitioner was permitted to bring a habeas petition under Section 2241 following the denial of his Section 2255 petition.

The Seventh Circuit in *In re Davenport*, 147 F.3d 605 (7th Cir. 1998), and the Fifth Circuit in *Reyes-Requena v. United States*, 243 F.3d 893 (5th Cir. 2001), adopted slightly more formulaic tests. Both courts emphasized that the initial key inquiry was whether the prisoner had been afforded "a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence." *Davenport*, 147 F.3d at 609; *see also Reyes-Requena*, 243 F.3d at 904. These courts also stressed the nature of the claim needed to be one where the substantive reach of the offense had been changed, thereby resulting in the potential incarceration of an innocent person, a person convicted of an offense which is no longer an offense, or a person who is actually innocent. *Id.* Both the Seventh Circuit and the Fifth Circuit found the standard set forth in the Third Circuit in *Triestman* to be too broad and "standardless" even though they agreed that it focused on the correct policy concerns. *E.g.*, *Reyes-Requena*, 243 F.3d at 903 & n.28.

By far the most stringent test has been adopted by the Eleventh Circuit in *Wofford v. Scott*, 177 F.3d 1236, 1244 (11th Cir. 1999), and applied to Petitioner's case. Under *Wofford*, a federal prisoner can

advance a claim under the savings clause only upon satisfying a three-part test: 1) the claim must be based on a retroactively applicable Supreme Court case; 2) the holding of the Supreme Court decision establishes that the petitioner was convicted for an offense that is now nonexistent; and 3) circuit law in the circuit from which the case has come and in the Eleventh Circuit must have foreclosed such a claim at the time it otherwise could have been brought at trial, appeal, or at the first Section 2255 motion. *Id.* Moreover, this tri-partite test must be satisfied before the court will even consider evidence of the actual innocence of the prisoner. *Wofford*, 177 F.3d at 1244; *Sawyer v. Holder*, 326 F.3d 1363, 1367 (11th Cir. 2003).

Other lower courts have addressed, with conflicting results, whether Section 2241 only recognizes claims involving the conviction of defendants or also involves sentencing errors. In *United States v. Padilla*, 416 F.3d 424, 427 (5th Cir. 2005), for example, the Fifth Circuit concluded that a challenge to the constitutionality of a sentence in excess of the statutory maximum was not recognizable under Section 2241 because Section 2241 habeas challenges were only permissible to challenge the validity of the conviction and not the sentence. "Thus, because Padilla does not attack his conviction and his claims challenge only the validity of his sentence, Padilla's Section 2241 petition does not fall within the savings clause of Section 2255." *Id.*

In contrast, in *Poole v. Dotson*, 469 F. Supp. 329, 335-36 (D. Md. 2007), the District Court in Maryland concluded that challenges to the propriety of a sentence that exceeded the amount of prison time that would have been possible in the absence of a prior criminal conviction was recognizable under Section 2241, because Section 2255 proved inadequate to test the legality of his detention. Because petitioner's erroneously calculated criminal history placed him in a position where his sentence far exceeded the otherwise applicable sentence and absent a habeas petition he had no "reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence," through Section 2255, Section 2241 would be available to afford the prisoner that opportunity to have his claim heard on the merits. *Id.*

In sum, the "inadequate and ineffective" language of the savings clause of Section 2255 has been interpreted in a variety of inconsistent ways across the Circuits. The ability of federal prisoners to bring successful claims is thus determined not by a uniform standard of law but by the whim and caprice of the facility in which the prisoners find themselves to be housed. Had Petitioner been housed in a correctional facility located in the Second, Third, or the Ninth Circuits rather than the Eleventh Circuit, for example, his claims would be heard on the merits as he easily would have satisfied any of these Circuits' tests. But because he found himself housed in the Circuit with the most severe tri-partite standard, his

claims were turned away without consideration of the merits. This is an unacceptable state of affairs that this Court should promptly remedy by granting certiorari to give the lower courts guidance and adopt a uniform standard for savings clause petitions.

B. The Circuit Court of Appeals are in Direct Conflict on Whether a *Richardson* Violation May Be Raised in a Section 2241 Petition.

Not only are the lower courts in need of clear guidance from this Court on the appropriate standard to apply in determining what class of cases falls under the "inadequate and ineffective" savings clause of Section 2255, but the courts of appeals are equally divided on whether the specific claim alleged in Petitioner's case is cognizable in a Section 2241 petition. In *Richardson*, this Court held that the CCE statute required jury unanimity in respect to each individual violation alleged to have constituted the series of violations and that it would be insufficient to find a defendant guilty of just any series of violations. *Richardson*, 526 U.S. at 824. The CCE statute required unanimity because each violation was an "element of the offense" and "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." *Id.* at 817. Thus, pre-*Richardson* (the practice in effect at the time Petitioner's conviction was obtained) "the jury need[ed] only agree that the defendant committed at least three of all the [violations

charged]. . . . and need not agree about which three," while after *Richardson*, "the jury must agree unanimously about which three crimes the defendant committed." *Id.* *Richardson* consequently changed the elements of the offense of a CCE.

Richardson thus fell into that line of cases in which this Court has altered the meaning of a criminal statute enacted by Congress and its "substantive reach" and in which application of that statute has been given retroactive effect on collateral litigation. *Schriro v. Summerlin*, 542 U.S. 348, 353-54 (2004). "A decision that modifies the elements of an offense is normally substantive rather than procedural. New elements alter the range of conduct that the statute punishes, rendering some formerly unlawful conduct lawful or vice versa." *Schriro*, 542 U.S. at 354. "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him.'" *Id.* (internal quotations omitted): *see also Bousley v. United States*, 523 U.S. 614, 620 (1998); *Bailey*, 516 U.S. at 145.

Thus, both the Ninth Circuit and the Second Circuit following *Richardson* have recognized that *Richardson* errors involve potentially the conviction of actually innocent persons: persons who may be incarcerated for an offense that was not a federal offense at the time they were convicted. *Stephens v. Herrera*, 464 F.3d 895, 898-99 (9th Cir. 2006); *Cephas v. Nash*, 328 F.3d 98, 104-05 (2d Cir. 2003). Thus, the

Ninth Circuit in *Stephens* held a *Richardson* claim may be brought under Section 2241 by a federal inmate. Unfortunately for Stephens, but unlike Petitioner here, he could not demonstrate actual innocence of the CCE because he was convicted of substantive offenses constituting the series of transactions. *Id.* Thus, the Court denied his Section 2241 petition *on the merits*.

Likewise, in *Cephas* the Second Circuit concluded that the *Richardson* claim was one that could be considered properly under Section 2241 but petitioner would have to demonstrate his actual innocence on his *Richardson* claim. Like the petitioner in *Stephens*, the petitioner in *Cephas* could not make the showing of actual innocence because he was convicted of numerous substantive drug offenses constituting the series of transactions. Thus, the Second Circuit affirmed the dismissal of the Section 2241 petition *on the merits*.

In contrast to the Second and Ninth Circuit decisions, the Seventh, Eleventh, and Fifth Circuits have squarely held that *Richardson* claims are not properly cognizable under Section 2241. *Sawyer*, 326 F.3d at 1366; *Kramer v. Olson*, 347 F.3d 214, 217-18 (7th Cir. 2003); *Jeffers v. Chandler*, 253 F.3d 827, 831 (5th Cir. 2001). These three Circuits have all held that *Richardson* claims are not cognizable under Section 2241 because the change in the reach of the statute interpreted by this Court did not render conduct which was once criminal, non-criminal; the *Richardson* decision "merely clarified the standard by

which a jury must find a defendant guilty of the CCE offense, but it did not invalidate CCE offenses." *Sawyer*, 326 F.3d at 1366; *see also Jeffers*, 253 F.3d at 831; *Kramer*, 347 F.3d at 217-18. These courts recognized that *Richardson* had retroactive effect and that their prior law barred the petitioners from having had their claims heard previously, but because they also required conviction for a non-existent offense, the courts rejected *Richardson* claims in a Section 2241 proceeding. *Id.* These decisions dismissed *Richardson* claims *without* addressing the merits of the claim.

These decisions are most surprising and highlight the impropriety of the strict tri-partite test created by the Eleventh Circuit and these other Circuits. For example, every circuit to consider whether *Richardson* is retroactive to cases on collateral appeal, including these three, have held that because *Richardson* fundamentally altered the substantive reach of the statute, it is retroactive in collateral proceedings. *Ross v. United States*, 289 F.3d 677, 681 (11th Cir. 2002) (*Richardson* is retroactive to cases under Section 2255); *United States v. Lopez*, 248 F.3d 427, 432 (5th Cir. 2001) (same); *Lanier v. United States*, 220 F.3d 833, 838 (7th Cir. 2000) (same); *Murr v. United States*, 200 F.3d 895, 906 (6th Cir. 2000) (same); *Santana-Madera v. United States*, 260 F.3d 133, 138-39 (2d Cir. 2001); *United States v. Dago*, 441 F.3d 1238, 1243 (10th Cir. 2006) (same). The Eleventh, Seventh, and Fifth Circuits do not explain how *Richardson* could be retroactive to cases on collateral

appeal (Section 2255), but not to cases brought under Section 2241. If it is fundamentally unfair for a defendant in a post-conviction petition under Section 2255 to be convicted of a CCE offense without unanimity as to the predicate offenses, thus triggering the right of defendants to challenge those convictions on collateral attack under Section 2255, it must also be fundamentally unfair for defendants in a post conviction 2241 petition to be convicted of a CCE offense without unanimity as to the predicate acts. There is simply no principled way to hold, as the three Circuits do, that an actually innocent 2255 petitioner has a right to be heard on the merits, but an actually innocent 2241 petitioner does not have a right to be heard on the merits.

Aside from the obvious doctrinal inconsistencies in such a rule, serious questions arise of whether such a rule amounts to a wrongful suspension of the writ of habeas corpus. As this Court has noted on several occasions, the core principle against finding a wrongful suspension of the writ is that the rights under habeas and the rights under Section 2555 must be coextensive. Moreover, this Court has made plain in *Swain* and *Hayman* that Section 2255 was not enacted to limit the right of habeas corpus but to replicate the rights under habeas. Yet the Eleventh Circuit's decision below denies petitioner the meaningful right to be heard he would have under Section 2255, but cannot have under Section 2241.

The differing approaches could perhaps be justified in a case where the petitioner intentionally abandoned his right to raise the *Richardson* claim in his Section 2255 petition and sat on his rights. But such a claim is not applicable here, where Petitioner sought the unanimity instruction at all the stages of the proceedings he was permitted to raise the issue: as an instruction at trial, on direct appeal, before this Court on certiorari, in his Rule 35, his Rule 35 appeal, in his second certiorari petition to this Court, in his Section 2255 petition appeal, in his request to amend his certificate of appealability, in his application for a second or successive Section 2255 petition, in his Section 2241 petition, and in his Section 2241 petition appeal. Moreover, such an argument could not be heard in a case in which the court of appeals directed Petitioner to have his *Richardson* claims heard on the merits in his first Section 2255 appeal, only to be turned away for following the court's directives. No rule of law founded on justice can operate this way. *See Bowles v. Russell*, 127 S. Ct. 2360, 2367 (2007) (Souter, J., dissenting) ("It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch.") (district court told petitioner the deadline for filing the notice of appeal on a certain date; notice filed prior to that date subsequently held to be untimely and jurisdictional, defeating petitioner's appeal).

C. The Issues Implicated by This Petition are Important and are Among the Most Common Confronting the Lower Courts.

Over the years, as the number of persons incarcerated has increased, so has the number of lawsuits initiated by inmates. *E.g.*, Administrative Office of the U.S. Courts, *Federal Judicial Caseload: Recent Trends*, 5, 10-11 (2003) (percentage of inmate appeals and petitions in district court rose 15% from 1991 to 1996, before declining 8% between 1997 and 2001) (available at www.uscourts.gov.). Habeas petitions have risen almost 50% over a five year period as inmates "appear to have shifted from using Section 2254 (specifically addressed in the AEDPA) to using 28 U.S.C. 2241." *Id.* at 11. One out of every four civil cases filed in the federal district courts in 2006 continues to be a prisoner lawsuit and 55% of these are challenges to the lawfulness of criminal convictions. Administrative Office of the U.S. Courts, *CaseLoad Statistics*, Table C-2 (2007) (available at www. uscourts.gov.). Thus, the issues raised by this petition are among the most common confronting the federal courts and will continue to be heard by and revisited by the lower district courts and courts of appeals. These inferior courts are in need of guidance from this Court. These issues are important ones, determining whether persons shall have their day in court, and under what circumstances they may be heard to complain about fundamental defects in their trials and to present evidence of their actual innocence.

II. The Eleventh Circuit's Application of its Tri-Partite Test for Considering Federal Habeas Petitions Arising out of Title 28, United States Code, Section 2241, Rendered Section 2255 "inadequate and ineffective" to Address Constitutional Claims Because it Barred Consideration of *Richardson* Claims, Barred Consideration of Evidence of Actual Innocence, and Barred Equitable Considerations Which Have Historically Been the Cornerstone of Habeas Jurisprudence.

The Eleventh Circuit's rigid tri-partite standard for assessing federal inmates' Section 2241 claims runs directly counter to a basic understanding of the traditions, principles, history, and application of the "Great Writ" throughout the years as is reflected in this Court's cases. Habeas corpus has as its core principle the rule that "in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of the law, the individual is entitled to his immediate release." *Fay v. Noia*, 372 U.S. 391, 402 (1963), *overruled in part by Wainwright v. Sykes*, 433 U.S. 72 (1977). This Court has thus noted on many occasions that, "fundamental fairness is the central concern of the writ of habeas corpus." *Strickland v. Washington*, 466 U.S. 668, 697 (1984). This Court has always "adhered to the principle that habeas corpus is, at its core, an equitable remedy." *Schlup v. Delo*, 513 U.S. 298, 320 (1995); *Duckworth v. Eagan*, 492

U.S. 195, 213 (1989) (O'Connor, J, concurring) ("the Court has long recognized that habeas corpus [is] governed by equitable principles."). Appeals to habeas corpus courts call not for formulaic solutions, but remedies fashioned by a concern for equitable principles. *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (borrowing civil stay of judgment rules in habeas corpus cases to utilize in the exercise of their discretion). "Federal habeas corpus practice, as reflected by the decisions of this Court, indicates that a court has broad discretion in conditioning a judgment granting habeas relief." *Id.* That is why Congress too has instructed federal courts to dispose of habeas corpus matters as "law and justice require." 28 U.S.C. §2243.

The Eleventh Circuit's rigid formulation derogates from these essential equitable principles in at least three distinct ways. First, its creation of a rigid formulation is contrary to the equitable nature of the remedy of habeas corpus. The Second Circuit in *Treistman* recognized, to the contrary, that each case could be decided as the court confronted it, with the guiding principles of actual innocence, fundamental fairness, and an opportunity to be heard. The Eleventh Circuit's rule is an inflexible rule, which, to be sure, has the benefit of easy resolution but comes at the great expense of justice and liberty. Just a sampling of recent Eleventh Circuit unpublished decisions reveals that its tri-partite test, while "strict in

theory, is fatal in fact." *E.g.*, *Johnson v. California*, 543 U.S. 499, 514 (2005).[2]

Second, as is more fully explained in the next section, the tri-partite test does not permit consideration of even actual innocence claims. The failure to be flexible enough to even consider a petitioner's actual innocence is fundamentally at odds with the great traditions and history of the federal constitution's protection of habeas corpus and this Court's insistence that the writ remain an essential freedom and right to correct unjust incarceration.

Third, as noted above, the tri-partite test fails to permit consideration of *Richardson* claims. This failure is especially problematic because every court of appeals recognizes *Richardson* claims in Section 2255 petitions, and the danger that innocent persons could be wrongfully convicted of such claims if they were not permitted in post-conviction petitions. But the Eleventh Circuit, joined by a few other Circuits, fails to permit such claims in a direct habeas action.

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[2] *See, e.g.*, *Rivers v. McKelvy*, No. 06-15993, 2007 WL 1575323 (11th Cir. June 1, 2007) (denying 2241 claim); *Davis v. Pugh*, 222 F. App'x 925 (11th Cir. 2007) (same); *Williams v. United States*, 218 F. App'x 832 (11th Cir. 2007) (same); *Emuchay v. Vasquez*, 213 F. App'x 899 (11th Cir. 2007) (same); *Dixon v. United States*, 207 App'x 941 (11th Cir. 2006) (same); *Campbell v. Yates*, 196 F. App'x 759 (11th Cir. 2006) (same); *Collazo v. United States*, 190 F. App'x 759 (11th Cir. 2006) (same); *Dukes v. United States*, 189 F. App'x 850 (11th Cir. 2006) (same). This list is merely a partial list, which could easily be tripled in length.

Prisoners, such as Petitioner here, who are wrongfully convicted and who present claims of actual innocence, but who cannot avail themselves of Section 2255 by virtue of the timing of the *Richardson* decision and procedural happenstance, must have the ability to have their claims heard under Section 2241; the failure to permit them to do so goes to the core of the inadequacy and ineffectiveness of Section 2255.

III. Evidence of Actual Innocence, Both as a Gateway Claim and as a Substantive Claim, Must Be Evaluated as Part and Parcel of the Initial Consideration of a Section 2241 Petition; the Eleventh Circuit's Refusal to Consider Such Evidence Until and Unless its Procedural Hurdles are Satisfied is Contrary to Well-Established Historical Standards in Habeas Proceedings.

A. The Refusal to Consider Actual Innocence Substantive and Gateway Claims as Part and Parcel of the Section 2241 Petition is Contrary to *House v. Bell*, ___ U.S. ___, 126 S. Ct. 2064 (2006) and Numerous Decisions of this Court.

The most important equitable consideration of them all, however, is that Petitioner is actually innocent of the charges for which he stands convicted. "Most telling of all, this Court continuously has recognized that the ultimate equity on the petitioner's side – a sufficient showing of actual innocence – is normally sufficient, standing alone, to

outweigh other concerns and justify adjudication of the prisoner's constitutional claim." *Withrow v. Williams*, 507 U.S. 680, 700 (1993) (O'Connor, J, concurring in part and dissenting in part). In a long line of cases, this Court has stated that successive, federal habeas review is not foreclosed where a petitioner can make a colorable claim of actual innocence. *Kuhlman v. Wilson*, 477 U.S. 436, 454 (1986); *Murray v. Carrier*, 477 U.S. 478 (1986); *Smith v. Murray*, 477 U.S. 527 (1986). In these cases, the Court strove to strike a balance between the governmental interest in finality of criminal judgments and the prisoner's interest in access to a forum to test the basic justice of his sentence. *Wilson*, 477 U.S. at 452. Toward this end, Justice Powell, writing for the plurality in *Wilson*, emphasized the importance of the prisoner's interest, an interest so compelling it survived even in a case where the original trial was free from constitutional error:

> The prisoner may have a vital interest in having a second chance to test the fundamental justice of his incarceration. Even where, as here, the many judges who have reviewed the prisoner's claims in several proceedings provided by the State and on his first petition for federal habeas corpus have determined that his trial was free from constitutional error, *a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent* of the charge for which he was incarcerated.

Wilson, 477 U.S. at 452 (Powell, J.) (concurring) (emphasis added).

The Eleventh Circuit's rigid tri-partite test also does not permit or even consider evidence of actual innocence in addressing a petitioner's Section 2241 petition. This holding is fundamentally out of step with this Court's long line of cases addressing the historical significance of actual innocence in habeas cases.

Not only is the decision contrary to this Court's habeas cases but it is directly contrary to this Court's approach in assessing gateway actual innocence claims. In *House v. Bell*, ___ U.S. ___, 126 S. Ct. 2064 (2006) this Court held that a habeas petitioner relying upon a claim of actual innocence may utilize that claim as a gateway to overcome any alleged procedural default for having failed to raise the claim at the original trial of the matter. *Id.* "[P]risoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *House*, ___ U.S. at ___, 126 S. Ct. at 2077. In reaching that conclusion, this Court relied in part on the standards previously set forth in *Schlup v. Delo*, 513 U.S. 298 (1995) and *Herrera v. Collins*, 506 U.S. 390 (1993).

The Eleventh Circuit refused to consider either gateway actual innocence or a substantive innocence claim until Petitioner satisfied its own tri-partite test.

The Petitioner here asserted both claims. By ruling that the evidence of actual innocence could not even be considered until the merits of the claim were analyzed, the Eleventh Circuit eviscerated the gateway actual innocence claim entirely. *House* makes plain, however, that such a gateway claim remains valid and that it must be considered in determining whether the claim could be heard at all.

This Court made clear in *House* that the reviewing court's function is to consider "all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *House*, ___ U.S. ___, 126 S. Ct. at 2077 (internal quotations omitted). Finally, "[b]ased on this total record, the court must make a probabilistic determination about what reasonable, properly instructed jurors would do. The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors." *Id.* (internal citation and quotations omitted). This analysis, moreover, is to be conducted as part of the determination of whether the claim may advance to the merits stage. It is, in fact, precisely the detailed analysis this Court undertook in carefully assessing the newly discovered evidence against the evidence adduced at trial in *House*. This Court's holding, that House had made out a gateway actual innocence claim and should have his procedurally defaulted claims considered – but refusing to find the case to be one of

"conclusive exoneration," – and its remedy – remanding the case for consideration of his procedurally defaulted constitutional claims – definitively demonstrates that gateway actual innocence claims must be considered at the gateway and not only after a petitioner has somehow gained entrance through the portal by some other means. *House*, ___ U.S. ___, 126 S. Ct. at 2077. The Eleventh Circuit ruling that Petitioner must first gain entrance before his gateway claim would be considered is clearly contrary to *House*.

The Eleventh Circuit's formulation below was thus, not only contradictory to *Schlup* and *House*, but it also contravenes the purposes of the savings clause, the purposes of actual innocence claims, and may well constitute a suspension of the writ of habeas corpus. As an initial matter, the conviction that the Eleventh Circuit gave great weight and finality to is one that everyone acknowledges was obtained by reason of a grave constitutional error, to wit, a violation of Petitioner's sixth amendment rights to a unanimous jury and in contravention to the reach of the CCE statute. Because that conviction was obtained as a result of constitutional error, Petitioner's "conviction may not be entitled to the same degree of respect as one, such as Herrera's [*Herrera v. Collins*, 506 U.S. 390 (1993)], that is the product of an error free trial." *Schlup*, 513 U.S. at 316. In other words, what the jury in Petitioner's case decided based on its misapplication of the law regarding the predicate offenses that constituted the elements of the CCE offense, sheds very

little light whatsoever on what a *properly* instructed jury would probably decide based on the evidence adduced at trial.

Second, Petitioner has never had any fact-finder, whether it be a jury or a judge, review the evidence in his case based on the constitutionally appropriate standards and in consideration of the proper reach of the CCE statute. It was necessary for the Petitioner to present to the district court, and for the district court to consider, all the evidence at trial, and to weigh that evidence (with credibility determinations as well, *see Schlup*, 513 U.S. at 330), in light of the correct constitutional standard.

Finally, as noted above, one of the central purposes of the writ of habeas corpus is to ensure against conviction and punishment of those who are innocent of committing the crime. *Bousley*, 523 U.S. at 620 ("one of the 'principal functions of habeas corpus [is] to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted'"); *O'Neal v. McAninch*, 513 U.S. 432, 444 (1995) ("basic purposes underlying the writ" include correcting "the sort of [constitutional error] that risks an unreliable trial outcome and the consequent conviction of an innocent person."). It detracts from the fundamental purposes of habeas corpus to refuse to consider evidence of actual innocence until after a petitioner jumps over procedural hurdles of the Eleventh Circuit's making.

B. The Refusal to Consider Actual Innocence Claims as Part and Parcel of the Section 2241 Petition is in Conflict with the Decisions of Other Courts of Appeals.

Other Circuits have held that evidence concerning actual innocence can and should be considered in determining whether to open the portal to a Section 2241 petition. For example, the Ninth Circuit in *Stephens,* 464 F.3d at 898-99, considered a *Richardson* claim brought under Section 2241 by a federal inmate. The court concluded that the *Richardson* claim was one properly brought under the savings clause pursuant to Section 2241 and that he had advanced an actual innocence claim. "Along with many of our sister circuits, we have held that a §2241 petition is available under the 'escape hatch' of §2255 when a petitioner (1) makes a claim of actual innocence, and (2) has not had an 'unobstructed procedural shot' at presenting that claim." *Stephens*, 464 F.3d at 898 (citing authorities).

Likewise, in *Cephas*, the Second Circuit concluded that Section 2255 remedies are "inadequate and ineffective" when a federal prisoner can demonstrate (1) "actual innocence on the existing record" and (2) where the prisoner "could not have effectively raised [his] claim of innocence at an earlier time." *Cephas*, 328 F.3d at 104-05. *Cephas* concluded, like the Ninth Circuit, that the *Richardson* claim was properly one that could be considered under Section 2241 but petitioner could not demonstrate his actual

innocence on his *Richardson* claim (because he was convicted substantively of several drug offenses). *Id.* As the *Cephas* court noted, "if [he] were able to advance a colorable claim that he was actually innocent of participating in a CCE" under *Richardson* such a claim would be properly brought under Section 2241. *Id.* Both of these courts, however, viewed the proper approach to addressing such claims as considering and addressing the actual innocence evidence and argument *as part of the* determination of whether the claim could go forward contrary to the Eleventh Circuit's test.

C. The Refusal to Consider Actual Innocence Claims as Part and Parcel of the Section 2241 Petition Constitutes a Wrongful Suspension of the Writ of Habeas Corpus.

The Eleventh Circuit's tri-partite rule is in contrast to its own rule in habeas proceedings arising out of state convictions, where it has permitted and considered evidence of actual innocence, as both a gateway claim to overcome procedural default and as a substantive matter at the same time it has considered the merits of claimed constitutional violations. *Davis v. Terry*, 465 F.3d 1249, 1251-53 (11th Cir. 2005). There is simply no justification for treating habeas cases arising out of state convictions any differently than habeas cases arising out of federal convictions. If anything, concerns of comity and federalism ought to counsel greater deference to *state*

judgments than to federal ones, but the Eleventh Circuit rule is to the contrary. The differing treatment for federal and state claims raising actual innocence claims is a sure indication that the Eleventh Circuit has interpreted the savings clause in a way that amounts to a suspension of the writ of habeas corpus for the Section 2255 collateral proceeding is clearly not equivalent to the Section 2241 or Section 2254 post-conviction process in state cases.

CONCLUSION

For the reasons noted herein, Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on October 1, 2007.

Respectfully submitted,

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App. 1

United States Court of Appeals
For the Eleventh Circuit

No. 07-11500

District Court Docket No.
03-00457-CV-OC-10-GRJ

EUGENE A. FISCHER,

Petitioner-Appellant,

versus

STAN YATES,
Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

JUDGMENT

(Filed Oct. 1, 2007)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: October 1, 2007
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-11500
Non-Argument Calendar

D. C. Docket No. 03-00457-CV-OC-10-GRJ

EUGENE A. FISCHER,

Petitioner-Appellant,

versus

STAN YATES,
Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

Before BIRCH, DUBINA and PRYOR, Circuit Judges.

PER CURIAM:

Eugene Fischer, a federal prisoner, appeals the dismissal of his petition for a writ of habeas corpus. Fischer challenges his conviction and sentence for participating in a continuing criminal enterprise ("CCE"). *See* 21 U.S.C. § 848. He argues that his

conviction was contrary to the decision of the Supreme Court in *Richardson v. United States,* 526 U.S. 813, 119 S. Ct. 1707 (1999), and newly discovered evidence establishes his actual innocence. Fischer contends that he is entitled to habeas relief under section 2241 based on the savings clause of section 2255. 28 U.S.C. §§ 2241, 2255. Because the district court correctly concluded that the savings clause of section 2255 does not apply to Fischer's petition, we affirm.

The availability of habeas corpus relief under section 2241 is a question of law we review *de novo. Darby v. Hawk-Sawyer,* 405 F.3d 942, 944 (11th Cir. 2005). Under the "'savings clause' of [section] 2255 . . . a prisoner [may] file a [section] 2241 petition only if an otherwise available remedy under [section] 2255 is 'inadequate or ineffective' to test the legality of his detention." *Id.* at 945. We have held that the savings clause applies to a claim only when "1) that claim is based upon a retroactively applicable Supreme Court decision; 2) the holding of that Supreme Court decision establishes the petitioner was convicted for a nonexistent offense; and, 3) circuit law squarely foreclosed such a claim at the time it otherwise should have been raised in the petitioner's trial, appeal, or first [section] 2255 motion." *Wofford v. Scott,* 177 F.3d 1236, 1244 (11th Cir. 1999). If a prisoner qualifies for the savings clause, the proper inquiry is whether the petitioner can establish actual innocence. *Id.* at 1244 n.3.

The only *Wofford* requirement at issue is whether Fischer was convicted for a nonexistent offense. Fischer argues that, because *Richardson* changed the elements of his offense, he was convicted of a nonexistent offense. We disagree.

Fischer's argument is foreclosed by our decision in *Sawyer v. Holder,* 326 F.3d 1363 (11th Cir. 2003). We expressly held in *Sawyer* that "a *Richardson* claim is not the type of defect that opens the portal to a [section] 2241 proceeding." *Id.* at 1366. We explained that "[t]he conduct necessary to [establish] a CCE offense is the same post-*Richardson.*" *Id.* "*Richardson* clarified the standard by which a jury must find a defendant guilty of a CCE offense, but it did not invalidate CCE offenses." *Id.* Although Fischer correctly observes that his appeal differs from *Sawyer* because, unlike the defendant in *Sawyer,* Fischer did not have any substantive convictions that provided assurance that the jurors unanimously agreed on the specific violations underlying his CCE conviction, our statement in *Sawyer* that *Richardson* claims do not open the portal to section 2241 proceedings was unqualified. The district court correctly dismissed Fischer's petition.

Fischer's argument that his claim of actual innocence should open the gateway to a section 2241 petition is also unavailing. In *Wofford,* we explained that a claim of actual innocence claims is considered after the portal to a section 2241 proceeding is opened. 177 F.3d at 1244 n.3. A claim of actual innocence is not an exception to the requirement that a

petitioner first qualify under *Wofford* for the savings clause.

The denial of Fischer's petition is

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

EUGENE A. FISCHER,

Petitioner,

v.

STAN YATES, et al.,

Respondent.

Case No.
5:03-cv-457-Oc-10GRJ

ORDER DENYING PETITION

(Filed Mar. 22, 2007)

Petitioner initiated this case by filing a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 (Doc. 1). The Petition stems from Petitioner's 1988 convictions in the Southern District of Illinois for one count of participating as a principal administrator, organizer, or leader of a continuing criminal enterprise (CCE) in violation of 21 U.S.C. § 848, and one count of conspiring to distribute marijuana in violation of 21 U.S.C. § 846. *See United States v. Kramer,* 955 F.2d 479, 481 (7th Cir. 1992). Petitioner received a mandatory life sentence for the CCE conviction and a 35-year concurrent sentence for the conspiracy conviction. *Kramer,* 955 F.2d at 482. Petitioner argues that he is entitled to seek relief from his CCE conviction under § 2241 by way of the "savings clause" of 28 U.S.C. § 2255, and pursuant to *Richardson v. United States,* 526 U.S. 813, 817-24 (1999), in which the Supreme Court held that a jury must

unanimously agree as to which specific violations make up the continuing series of offenses underlying a CCE conviction. Petition, Doc. 1. The Government has filed a response, and this case is now ripe for determination. For the following reasons, the Court concludes that the Petition must be denied.

Procedural History

According to the Seventh Circuit opinion, the trial evidence established that Petitioner, along with his co-defendants, orchestrated a series of marijuana transactions including: importing 30,000 pounds of marijuana into Bridgeport, Connecticut, in the spring of 1983; importing 14,000 pounds of marijuana into New York in the fall of 1983; importing 147,000 pounds of marijuana into San Francisco in 1984; importing 152,000 pounds of marijuana into New Orleans in 1985, and importing 130,000 pounds of marijuana into San Francisco in 1986. *Kramer,* 955 F.2d at 482-83.

Although *Richardson* had not yet been decided, Petitioner raised the jury unanimity issue in the trial court and on direct appeal. *Id.* at 486-87. The Court of Appeals rejected the argument, noting that "[t]he general unanimity instruction required the jury to find that the appellants committed at least *three* predicate acts. Thus the appellants' unanimity argument is unavailing." *Id.* at 487.

Subsequently, the Supreme Court decided *Rutledge v. United States,* 517 U.S. 292, 307 (1996), in

which it held that a § 846 conspiracy is a lesser included offense of a § 848 CCE. Petitioner thereafter sought relief in the district court pursuant to Fed. R. Crim. P. 35. The district court vacated the conspiracy conviction, subject to reinstatement should the CCE conviction ever be overturned, and the Court of Appeals affirmed. *See United States v. Fischer,* 205 F.3d 967, 969 (7th Cir. 2000). During the Rule 35 appeal, the Supreme Court decided *Richardson,* and the Court of Appeals granted Petitioner leave to brief that issue. *Fischer,* 205 F.3d at 969-70. The Court determined that the *Richardson* argument was an attack on the underlying CCE conviction, not on the sentence imposed, and that such a challenge must be litigated under § 2255. *Id.* at 972. Fischer had filed a § 2255 motion in 1997, and the district court's denial of the motion was at that time on appeal. *Id.*

Petitioner had not asserted his CCE jury-unanimity argument in his § 2255 motion in the district court. In the § 2255 appeal, Fischer petitioned to amend his application for a Certificate of Appealability (COA) to include this claim pursuant to *Richardson. Fischer v. United States,* 285 F.3d 596, 599 (7th Cir. 2002). The Court of Appeals denied Fischer a COA as to the habeas issues raised in the district court, but granted a COA limited solely to the *Richardson* issue. *Id.* The Court also denied Petitioner leave to file a successive § 2255 motion. The Court then held that Fischer had waived the jury unanimity issue by failing to raise it in his habeas petition in the district court. *Id.* at 600-01. In response

to Petitioner's argument that the Court of Appeals had advised him to seek relief on the *Richardson* claim in his § 2255 appeal, the Court explained that the opinion in the Rule 35 case had only advised Petitioner of the proper method for raising the claim and that the COA only permitted Fischer to obtain the Court's review. *Id.* at 601. The Court held that "[n]either the Rule 35 opinion, nor the [COA] relieved Fischer of complying with the procedural requirements necessary to pursue his *Richardson* claim, and his failure to challenge the lack of jury unanimity before the district court is fatal to his claim on appeal." *Id.*

Petitioner's Claims

Petitioner asserts that he is entitled to seek relief on his *Richardson* claim in this court under § 2241 because his claim meets the requirements of the § 2255 savings clause. Petitioner contends that § 2255 is inadequate to test the validity of his conviction, and that he is actually innocent of the offense of conviction. *See* Petition, Doc. 1, 10-11. Petitioner argues that a jury required to unanimously agree on the specific CCE violations would likely not have been able to do so, in light of the evidence presented at trial. *See id.* at 42. As support for his actual-innocence claim, Petitioner points to evidence adduced in subsequent trials of Petitioner's co-defendant Ben Kramer and others on RICO and money laundering charges in the Southern District of Florida and related forfeiture proceedings. *Id.* at 44.

According to Petitioner, the evidence in those proceedings did not link Petitioner in any way to the activities of his co-defendants. *Id.* at 45-51.

Petitioner also moves for leave to file supplemental authority, arguing that *House v. Bell,* ___ U.S. ___, 126 S. Ct. 2064 (2006) held that a Petitioner showing actual innocence may seek relief under § 2241. *See* Doc. 28. Petitioner's Motion to file such authority is **GRANTED**.

Discussion

The primary means of collaterally attacking a federal conviction and sentence is through a § 2255 motion. In this case, Petitioner is expressly precluded by § 2255 from pursuing any remedies under § 2241. Section 2255 states that a Petition such as this "shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that *such court denied him relief*[.]"

Under limited circumstances, a Petitioner may avoid the preclusive effect of that prohibition by invoking the "savings clause" of § 2255 which permits relief to be sought under § 2241 if it "appears that the remedy by motion [under § 2255] is inadequate or ineffective to test the legality of [the applicant's] detention." However, the unavailability of relief under § 2255 because of a limitations bar, the prohibition against successive petitions, or a procedural bar does not demonstrate that the § 2255 remedy is inadequate

or ineffective. *Wofford v. Scott,* 177 F.3d 1236, 1244 (11th Cir. 1999). In *Wofford,* the Eleventh Circuit held that:

> The savings clause of § 2255 applies to a claim when: 1) that claim is based upon a retroactively applicable Supreme Court decision; 2) the holding of that Supreme Court decision establishes the petitioner was convicted for a nonexistent offense; and, 3) circuit law squarely foreclosed such a claim at the time it otherwise should have been raised in the petitioner's trial, appeal or first § 2255 motion.

Id. (emphasis added). All three *Wofford* criteria must be satisfied, and thus the *Wofford* requirements will only be satisfied "in the narrowest of circumstances." *Id.*

Only if those narrow and stringent requirements are met may a Petitioner "open the portal" to a § 2241 proceeding, and once the portal is opened the Petitioner must then demonstrate "actual innocence." *Id.* (citing *Bousley v. United States,* 523 U.S. 614, 623 (1998) ("It is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency.")).

In this case, Petitioner's claims founder on the second *Wofford* requirement. Although *Richardson* applies retroactively and the Seventh Circuit determined that Petitioner's jury-unanimity argument was foreclosed by circuit precedent, Petitioner cannot show that the holding of *Richardson* establishes that

he was convicted of a nonexistent offense. In considering the second part of the *Wofford* test in *Sawyer v. Holder,* 326 F.3d 1363, 1365-67 (11th Cir. 2003), the Eleventh Circuit concluded that a *Richardson* claim "is not the type of defect that opens the portal to a § 2241 proceeding." "The conduct necessary to show a CCE offense is the same post-*Richardson. Richardson* clarified the standard by which a jury must find a defendant guilty of a CCE offense, but it did not invalidate CCE offenses. As such, [Petitioner] was not convicted of a nonexistent offense." *Id.* at 1366. *See also Kramer v. Olson,* 347 F.3d 214, 218 (7th Cir. 2003) (a petitioner is convicted of a nonexistent offense when he can "admit everything charged in [the] indictment, but the conduct no longer amounts to a crime under the statutes (as correctly understood).").[1]

Petitioner contends that *Sawyer* is distinguishable because the Eleventh Circuit in that case went on to point out that the jury found Sawyer guilty of five substantive drug offenses which necessarily established that the jurors agreed unanimously that he was guilty of those offenses, and therefore the core concern of *Richardson* was not implicated. *See* Reply, Doc. 25 at 11; *Sawyer,* 326 F.3d 1366. Petitioner argues that, unlike Sawyer, he was not convicted of any substantive drug offenses. The Respondent points

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[1] *Kramer* involved a *Richardson* claim asserted by one of Petitioner's co-defendants.

out that the jury also returned a unanimous money judgment forfeiture verdict against Petitioner in the amount of $30 million, which was the total amount alleged in the indictment to have been received by Petitioner for all of the drug transactions identified in Petitioner's CCE count, thus reflecting jury unanimity on the underlying offenses. *See* Doc. 17 at 8. Inasmuch as the Eleventh Circuit had concluded that Sawyer failed to meet the second *Wofford* requirement, arguably it was unnecessary for the Court to address the merits of Sawyer's *Richardson* claim. Because it is plain that *Sawyer* precludes relief under § 2241 in this case because Petitioner cannot satisfy the second prong of *Wofford,* the court will not address the merits of Petitioner's jury-unanimity claim.

Petitioner argues that his actual-innocence claim should serve to "open the portal" to relief under § 2241, and cites *House v. Bell* as support. *See* Doc. 28. The Eleventh Circuit has recently explained that "*House* restates the well established rule that actual innocence may overcome a procedural default . . . [n]onetheless, we will not address the question of whether [Petitioner] has overcome his procedural default until [he] has established that the savings clause of § 2255 applies to him and, therefore, that he can validly bring his § 2241 petition." *Ramiro v. Vasquez,* 2006 WL 3697298 (11th Cir. Dec. 13, 2006)

(unpublished).[2] Accordingly, because Petitioner in this case cannot establish that the savings clause of § 2255 applies to him, this court will not address whether Petitioner's assertion of innocence, based on evidence allegedly adduced in the subsequent Southern District of Florida cases, would be sufficient to overcome the procedural bars to his *Richardson* claim. *See id.*

Conclusion

For the foregoing reasons, the Petition is **DENIED**. The Clerk is directed to enter judgment accordingly, terminate any pending motions, and close the file.

IT IS SO ORDERED.

DONE AND ORDERED at Ocala, Florida, this 22nd day of March 2007.

/s/ Wm. Terrell Hodges
UNITED STATES
DISTRICT JUDGE

c: Counsel of Record

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[2] Pursuant to 11th Cir. R. 36-2, unpublished opinions are not considered binding precedent but may be cited as persuasive authority.

28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign

state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)[1] Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider –

(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

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[1] So in original. Two subsecs. (e) were enacted.

(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who –

(A) is currently in military custody; or

(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.

(e)[1] Except as provided in section 1405 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider –

(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who –

(A) is currently in military custody; or

(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1405(e) of the

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[1] So in original. Two subsecs. (e) were enacted.

Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.

(June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 112, 63 Stat. 105; Sept. 19, 1966, Pub.L. 89-590, 80 Stat. 811; Dec. 30, 2005, Pub.L. 109-148, Div. A, Title X, § 1005(e)(1), 119 Stat. 2742; Jan. 6, 2006, Pub.L. 109-163, Title XIV, § 1405(e)(1), 119 Stat. 3477.)

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28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open

to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action

in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105; Apr. 24, 1996, Pub.L. 104-132, Title I, § 105, 110 Stat. 1220.)